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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1944

MRS. PAULINE P. WEIL, E. J. STERN, AND M. E. KILPATRICK, AS EXECUTORS OF THE ESTATE OF J. B. WEIL, DECEASED,

Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Mrs. Pauline P. Weil, E. J. Stern, and M. E. Kilpatrick, as executors of the estate of J. B. Weil, deceased, respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit, to review a final judgment of that court, entered on the 18th day of October, 1944, whereby that Court affirmed the judgment of the Tax Court of the United States in a consolidated cause entitled, Estate of J. B. Weil, Deceased, et al v. Commissioner of Internal Revenue; Commissioner of Internal Revenue v. Estate of J. B. Weil, Deceased, et al, the consolidated cause being numbered 9732, 9733 in the said United States Circuit Court of Appeals for the Sixth Circuit. The judgment of the Circuit Court of Appeals is reported in *C. C. H. Standard Federal Reports 1944* §*9492*. It is not yet published in the Second Federal Reporter.

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STATEMENT OF MATTER INVOLVED.

The consolidated cause involved petitions for review both by the taxpayer and by the commissioner. The judgment of the Tax Court of the United States was affirmed on both petitions for review. The case presented a consolidated record for the two petitions. The questions involved however are wholly different, and the statement here presented will be confined throughout to the statement of the matters involved in the taxpayer's petition for review with respect to which the writ of certiorari is prayed.

J. B. Weil in his lifetime executed a trust indenture to himself as trustee whereby he conveyed certain stock to be held in trust for his daughter, Pauline Weil, and with certain future interests; the details to be stated later.

The Commissioner of Internal Revenue undertook to treat the income of this trust for the years 1934, 1935, 1936, and 1937 as the personal income of Weil, and assessed a tax against him based on that determination. The Tax Court sustained the Commissioner's action. For the years 1934 and 1935 the action of the Tax Court was based on *Helvering v. Stuart, 317 U. S. 154.* This part of the case is no longer of importance because of the statute working a retroactive repeal of the *Stuart* ruling. (*§167 of the Internal Revenue Code* as amended by ¶134 of the *Revenue Act of 1943*).

As to the years 1936 and 1937 the Tax Court held the income taxable to the grantor under *Clifford v. Helvering*, 309 U. S. 331. The difference between these two years and the years 1934 and 1935 arose out of the fact that in December, 1935 Weil had surrendered by an instrument in writing all right to use any part of the income from the trust for the support of his minor daughter.

The crucial question, therefore, and the one to which this petition for certiorari is addressed, is whether the

Tax Court and the Circuit Court of Appeals correctly applied the doctrine of the *Clifford* case to the trust involved in the case at bar. As will be pointed out later, the ruling here involved is directly in conflict with rulings in other Circuits.

The Circuit Court of Appeals rendered a brief opinion which adopted in toto the opinion of the Tax Court, merely saying that the judgment was "affirmed for the reasons stated in its memorandum findings of fact and opinion." The effect of this is to make the opinion of the Tax Court the opinion of the Circuit Court of Appeals, and it undoubtedly will be so treated by the bar when this case is considered as a precedent.

NATURE OF THE TRUST.

The trust indenture is in the record, beginning at page 20. The instrument whereby Weil surrendered the right to use any part of the trust income for the support and maintenance of his daughter is printed in the record, commencing at page 24. The two documents are perfectly clear and there appears to be no differnece of opinion as to their construction. So far as relevant to the immediate problem, the trust presents these features:

(a) The grantor is the trustee and is given wide powers of management of the trust.

(b) The trust is for the benefit of the grantor's daughter for life, with remainder to her children, if any, at the time of her death; if no children, then to the grantor's wife; if the grantor's daughter dies without leaving children, and without the grantor's wife being then in life, the corpus goes to a charity to be named by the trustee, but with the proviso that if the grantor is still the trustee he shall not have the power to name the charity but the same shall be named by one of two named men if living, if not by the Judge of the Probate Court in Davidson County, Tennessee.

(c) The grantor reserves no right to revoke the trust or to modify or change it in any way, or to recapture the assets.

The situation created by these instruments, therefore, may be summarized as follows: The grantor was the trustee and possessed of the powers of management, but under no circumstances and in no event could he obtain any economic benefit to himself from either the income or the corpus of the trust, nor could he under any circumstances or in any event alter in any way the disposition of the trust income or the trust corpus. So carefully does the trust instrument provide for this latter point that in the event the corpus ultimately goes to a charity, it is nevertheless provided that if the grantor is still the trustee at that time he shall not have the authority to name the charity but the same shall be named by others, as heretofore set out.

Inasmuch as the opinion of the Tax Court, which as stated was adopted in toto by the Circuit Court of Appeals, refers to "loose handling" of the trust, a brief statement should be made as to just what the record shows is here meant, namely: Weil had the practice in his own affairs of doing all his banking through the bank account of the Coca-Cola Bottling Works, and of having all of his personal bookkeeping done through the books of that Company. When this trust was created its banking and bookkeeping was similarly handled. In 1935, while Weil was ill in England, the bookkeeper for the Coca-Cola Bottling Works charged certain of Weil's personal expenses to the trust account. On Weil's return in 1936 and his discovery of this fact, these entries were all corrected and a correct settlement made with the trust eliminating these incorrect charges. The evidence is undisputed that Weil never at any time used any of the trust income for himself or his wife or his daughter, or to discharge any of his obligations. In 1937, before any tax questions had been raised, separate trust accounts were set up, and separate books were kept.

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JURISDICTION OF THE SUPREME COURT.

Jurisdiction is given to the Supreme Court of the United States to grant a writ of certiorari to review a decision of a United States Circuit Court of Appeals. *U. S. C. A. Title 28, §347.*

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QUESTIONS PRESENTED.

The following questions are presented in this case:

1. Does the rule in the *Clifford* case make the income of a trust taxable to the grantor where he is trustee with large powers of management, but where under no circumstances and in no event can he at any time gain any economic benefit from the income or corpus of the trust, and where there is no reversion to him and he cannot under any circumstances revoke the trust or change or alter in any way the disposition of the income or of the corpus? The Tax Court and the Circuit Court of Appeals have answered this question "yes". Other Circuit Courts of Appeals, as will hereinafter be pointed out, haven given a directly contrary answer.

2. If the issue of whether a grantor of a trust retains so substantially the incidents of ownership as to be taxable with the income is ordinarily a question of fact (*Dodson v. Commissioner, 320 U. S. 489*), do the facts outlined in the foregoing question, when uncontradicted in the record, make a case where a determination of such issue adverse to the taxpayer should be held to be without "a rational basis" in the record so that such determination constitutes an error of law?

3. In a situation such as outlined in the question numbered one, is the taxability of such income to the grantor affected by errors in bookkeeping which occurred without his knowledge or consent and were promptly corrected before any tax issues arose?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision here sought to be reviewed determined important questions of Federal law relative to the application of the Federal Revenue Statutes, which questions have not been definitely settled by decisions of this Court, namely:

(a) Under the doctrine of the *Clifford* case, is the income of a trust taxable to a grantor because he is the trustee with broad powers of management, even though he can never realize any economic benefit from the trust or revoke or modify it in any way, and has no right of reversion to himself under any circumstances, and cannot change in any way any of the beneficiaries of the income or of the corpus? There are hundreds and possibly thousands of trusts in this country in this situation. It is a normal way for a father to make a gift in trust to his children. No other court has ever held the income under such circumstances taxable to the grantor. Certainly the *Clifford* case does not so hold, since that case expressly rests on the fact that the arrangement there considered was a mere temporary re-allocation of income within a family group. Here the gift of income and corpus, throughout all its possible limitations over, is not temporary but permanent. The control in this respect is completely separated from the grantor and can never be re-taken by him. The startling result of this case, as well as the great importance of the question involved, justify the granting of the writ.

(b) Where the terms and provisions of a trust are in writing and all of the facts are undisputed and the situation presented with respect to such a trust is that outlined in the foregoing question, is a decision of the Tax Court that the income from such a trust was in reality the income of the grantor one

without "rational basis" in the record and hence error of law? It is submitted in this connection that there is no rational basis for saying a grantor had retained in fact the incidents of ownership of property, where without dispute he had irrevocably separated himself from any economic benefit from the property, and from any right ever to re-take any part of the income or corpus, or ever to change the disposition of the income or corpus.

(c) In a situation such as above outlined is the result changed because of carelessness and errors in bookkeeping which were corrected, and which worked no diversion of either the income or the corpus and resulted in no economic benefit to the grantor? Before this case no court has ever suggested anything of the kind. This is an entirely different question from that which would arise if the actual handling of the trust was such as to show that the whole trust was fictitious and unreal. Nothing of this kind is suggested by the record in this case, nor is anything of the kind found by the tax court or by the circuit court of appeals. The view actually taken by the court is novel and introduces an entirely new idea in tax law which it is important for this Court to settle.

(2) There is a direct conflict between the present decision and the decisions of other circuits.

(a) On the question as to whether the income of a trust of this kind is taxable to the grantor, the present case is directly in conflict with the decision of the Tenth Circuit in *Armstrong v. Commissioner, 143 F. 2d 700.* The two cases involve the same question and completely contradictory results are reached by the two circuits. The present case is also in effect in conflict with the decisions of the First Circuit in *Commissioner v. Branch, 114 F. 2d 985;* and *Plimpton v. Commissioner, 135 F. 2d 482;* and with the decision of the Second Circuit in *Phipps v. Commissioner, 137 F. 2d 141.* In view

of the frequency with which a trust of this character may be involved in a similar issue it is important that this conflict be resolved authoritatively by this Court.

(b) Insofar as the decision of the circuit court of appeals may be construed as meaning that the decision of the tax court, if treated as a finding of fact, has under these circumstances a rational basis in the record, and hence is binding upon the reviewing court, it is in conflict with the decision of the Tenth Circuit in *Armstrong v. Commissioner, 143 F. 2d 700;* and the decision of the Second Circuit in *Phipps v. Commissioner, 137 F. 2d 141;* and the decision of the First Circuit in *Plimpton v. Commissioner, 135 F. 2d 482.* The effect of these decisions is that under such undisputed state of facts as has been outlined, no conclusion is legally possible except that the income of such a trust is not taxable to the grantor, and hence that a decision to the contrary is error of law. As heretofore pointed out, the question here involved is one that will necessarily arise frequently and the conflict of decisions in this respect should be resolved.

WHEREFORE, petitioners pray that the writ of certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment herein referred to, and that upon said review the said judgment be reversed.

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